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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF.

FRANCIS H. DEXTER,
Attorney for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Questions presented	2
Grounds for appeal to the discretion of this Court	4
Statement	4
Property insured as described in policy	4
Answer—clause of policy relied on for defense	6
Respondent conceded that no misrepresentation made prior to issuance of policy	7
Conflicting evidence as to overvaluation of property insured	8
Evidence in support of claim for cost of labor on goods in process	9
Clause of policy covering labor on goods in process	9
Finding of Court of Appeals on this item in its first decision	9
Defendant's instruction on this item did not submit question of fraud, but only insufficiency of evidence to support it	12
The verdict rendered gave no implication as to whether or not this item was allowed	12
The motion for a directed verdict	12
Defendant's requests for instructions on question of fraud, generally	12
No exceptions were taken to the giving of plaintiff's requested instructions, or to the modification of defendant's instructions on the question of fraud	15
Verdict	16
No motion for new trial or in arrest of judgment was filed by defendant	16
Judgment	16
Assignment of error of appellant involved in this petition	16
Decisions and judgments of the Circuit Court of Appeals	16
A. The first decision and judgment of May 25, 1935, unanimously affirmed the judgment of the District Court	16
B. The decision and judgment of January 7, 1936, upon rehearing sought to be reviewed	18
Portions of the dissenting opinion of Judge Morton	23
Petitioner's contentions	24
Reasons for granting the writ	25
Brief in support of petition	27
Opinions below	27
Jurisdiction	27

Page

Specification of errors (petitioner's) 27
Argument and review of cases in conflict with the decision and judgment complained of 28
Conclusion 36

TABLE OF CASES CITED.

A.

Atlas Insurance Co. v. Hurst, 11 F. (2d) 250, C. C. A., 8th Circuit ... 33
American Central Insurance Co. v. Harmon Knitting Mills 39 F. (2d) 21, (C. C. A., 7th Circuit) 35

C.

Claflin v. Insurance Company, 110 U. S. 81 29
Connecticut Fire Insurance Co. v. Hurst, 11 F. (2d) 254, (C. C. A. 8th Circuit) 34
Camden Fire Insurance Co. v. Penick, 2 F. (2d) 964 (C. C. A., 5th Circuit) 32
Cuétara v. Royal Exchange Insurance Co., 23 F. (2d) 270 35
Columbian Insurance Co. v. Modern Laundry, 277 F. 355 (C. C. A., 8th Circuit) 36

G.

Great American Ins. Co. v. Roney & Berger Co., 42 F. (2d) 816 (C. C. A., 8rd Circuit) 29, 31
Globe & Rutgers Fire Insurance Co. v. Stallard, 68 F. (2d) 237 (C. C. A., 4th Circuit) 35

M.

Mack v. Lancashire Insurance Company, 4 Fed. Rep. 59 30

N.

National Fire Insurance Co. v. Renier, 22 F. (2d) 671 (C. C. A., 7th Circuit) 34

R.

Republic Fire Insurance Co. v. Welde, 14 Wallace 375 33

S.

Spring Garden Insurance Co. v. Amusement Syndicate Co., 178 F. 519 (C. C. A., 8th Circuit) 31
Slacum v. Pomeroy, 6 Cranch 221 36

STATUTES CITED.

Judicial Code, Sec. 240(a); U. S. Code, Sec. 347(a), Title 28 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 928

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, José Rivera Soler & Co., Inc., presents its petition for a writ of certiorari to review the final decision and judgment of the Circuit Court of Appeals for the First Circuit, January 7th, 1936, in the above case in which petitioner was appellee and respondent was appellant.

Upon a petition for a rehearing by appellant the Circuit Court of Appeals vacated its unanimous decision and

judgment of May 25, 1935, affirming the judgment of the District Court of the United States for Puerto Rico, of May 31, 1934, and entered judgment vacating such judgment of the lower court in favor of petitioner and remanding the case to the District Court with directions to enter an order in arrest of judgment. The first decision and judgment is reported in 77 F. (2d) 891, and in the additional record hereto attached at page 323.

The first decision was by Judge Morton; the later decision was by Judge Bingham—Judge Morton dissenting. It is not reported. It appears in the additional record, page 343 attached hereto.

One of the grounds relied on by the majority in the second opinion is entirely novel—without any precedent so far as we have been able to discover.

It inaugurates a new rule of law, which if allowed to stand will constitute a revolutionary conflict with judicial precedent.

The other ground relied on rests on what must be considered as an incomprehensible oversight by the majority of the court as to the facts in the record, to the great prejudice of petitioner: Although a basic misappreciation of fact in the prevailing opinion is demonstrable by reference to the printed record—and attention was called to it in the dissenting opinion—the error which is fundamental to the view taken by the majority was adhered to.

It is respectfully submitted that under such circumstances the petitioner is entitled to come to this Court for relief. A more detailed presentation of the matter follows.

Questions Presented.

(A) In a suit in a District Court of the United States to recover on an insurance policy for total loss of property insured against fire, a defense was made of false and fraud-

ulent proofs of loss and false swearing upon the trial, which issue was submitted to the jury upon appropriate instructions given at the request of defendant, that if they found there was a false proof of loss, upon the conflicting evidence in the case, the policy was forfeited and plaintiff could not recover. The jury found for the plaintiff, rendering a verdict for approximately one-half of the claim. Did such verdict and the judgment entered thereon standing alone, nothing else being considered, establish on the record fraud as a matter of law which justified the Circuit Court of Appeals upon such alleged error assigned by the appellant insurance company, to vacate the judgment of the District Court and to remand the case with directions to arrest such judgment?

(B) In such a case as above stated, did the Circuit Court of Appeals err in declaring the law to be that "the verdict should have been either for nothing or in the neighborhood of $30,000", the full amount of the policy—the jury having awarded the sum of $17,000, and the proofs of loss having been $35,926.06?

(C) The Record on Appeal from the District Court disclosed considerable evidence offered by Petitioner and admitted in support of an item of $2,524.50 for "labor on goods in process", covered by the first item in the policy of described merchandise, etc., insured for $15,000, which fact was called to the attention of the majority members of the court by Judge Morton in his dissenting opinion. Was it not serious error which influenced and determined the decision, to the prejudice of petitioner, for the majority to hold that there was no such evidence—thus relying upon a mistaken premise to reach the conclusion that the alleged fraud of petitioner in this connection operated as a matter of law to forfeit the policy absolutely?

(D) Whether upon the overruling of a motion for a directed verdict and the presentation by respondent of requests for instructions submitting to the jury the question of fact of wilful and intentional false statements in connection with the proofs of loss; and not having taken exceptions to the modification by the court of such requested instructions, which were given as modified; and not having taken exception to the giving of similar instruction for petitioner; and not having filed a motion for a new trial or in arrest of judgment after the verdict rendered; the Circuit Court of Appeals erred in vacating the judgment of the District Court and ordering an arrest of judgment on the verdict obtained by petitioner.

Grounds for Appeal to the Discretion of This Court to Grant the Petition.

It is believed by counsel for petitioner that Questions A and B present a clear case of conflict with the decisions of other Circuit Courts of Appeals and with the weight of authority on the same matter; that Question C must necessarily be considered in connection with Questions A and B; and that Question D presents a question of procedure which departed from the accepted and usual course of judicial proceedings.

Statement.

The complaint filed in the District Court (page 1, Record on Appeal) alleged the issuance by defendant to plaintiff of a policy of insurance against loss by fire for the amount of $30,000, distributed as follows (pp. 2 and 3, Record on Appeal):

"THIRTY THOUSAND DOLLARS: For the term of one year, distributed as follows:

$15,000.00 On stock of merchandise, unembroidered, embroidered, and in the process of being embroidered, or for repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing and repairing the same, including boxes, samples and packages, the property of the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered all while contained in the two-story concrete building with zinc roof, situated at Pumerada St. No. 4, block No. 657 of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00 On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments, and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$3,000.00 On furniture, fixtures including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00 Total."

The complaint alleged the occurrence of a fire which destroyed all the merchandise and machinery, as above described, and the giving of due notice and a sworn proof of loss amounting to a total sum of $35,926.06.

The answer set up several defenses, including that of false and fraudulent sworn claim or proof of loss consisting of the over-valuation of the property insured, by reason of which it was claimed that the policy was forfeited.

This is the only defense which needs be considered in connection with the decision and judgment of the Circuit Court of Appeals sought to be reviewed.

This defense, as it appears in paragraph VI (a) of the answer (page 7, Record on Appeal), is as follows:

> "VI. For defenses the defendant alleges:
>
> (a) That the policy of insurance mentioned in the second amended complaint was issued by defendant and accepted by plaintiff subject to the following condition:
>
> '12. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under his policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or if the Insured or anyone acting on his behalf shall hinder or obstruct the Company in doing any of the acts referred to in Condition 11; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.'
>
> That in accordance with the provisions of said condition plaintiff has no right to indemnity under the

policy to which this case refers because on or about the 23d of March, 1932, plaintiff filed with defendant its proof of loss under oath claiming indemnity from defendant in the total sum of $30,000 and stating under oath that its property destroyed or affected or damaged by the fire mentioned herein had a value on the date of said fire of $35,926.01 when the truth is that the property located in the building damaged by said fire did not have a value in excess of the sum of $5,000.

Defendant alleges on information and belief that when plaintiff prepared, swore to and filed with defendant the above mentioned proof of claim it knew that the real value of all the property affected by said fire did not exceed the sum of $5,000 and that plaintiff wilfully and voluntarily and in bad faith, and with the sole purpose and intent of defrauding defendant, stated in said proof that the value of said property was $35,926.01 and claimed from defendant the sum of $30,000."

It was conceded upon the trial by attorney for respondent that there was no misrepresentation by petitioner prior to the issuance of the policy as to property insured and value thereof ("amount").

At the conclusion of the case attorney for respondent, and the court, made the following statements (Record on Appeal, page 316):

"Mr. Brown: With that modification, that is satisfactory. I think it was the sixth instruction asked by the plaintiff which recites the testimony of a witness Solo as to conversations as to what Saldana did at the premises prior to the insurance, the charge being that the fact that Saldana was there and saw the premises might be considered by the jury in connnection with any charge of misrepresentation as to amount. That is excepted to because there is no issue of misrepresentation in this case. There is no charge that prior to the issuance of the policy the plaintiff made representations that were acted upon.

"The Court: With that statement, I think that request goes out of the case. I had understood that there was a contention that plaintiff had misrepresented the goods on hand at the time the policy was issued, as well as the goods on hand at the time of the fire. That being the case, I will instruct you, gentlemen of the jury, to disregard that request because it can only apply to misrepresentation made at the time the policy of insurance was entered into, and since there was no such misrepresentation the charge does not apply."

There was evidence in support and denial of the alleged over valuation of property destroyed (p. 325, Additional Record).

"The plaintiff offered the evidence of several witnesses, including an expert accountant to the effect that its books and accounts were of such character as to afford a reasonably complete picture of its business activities, that they were honestly made and kept as required by the policy, and that the proofs of loss conformed to the books and were honest. While the defendant introduced a good deal of evidence to the contrary through witnesses to testify that the books and records were incomplete and insufficient, and not properly kept, and showed clear indications of having been fabricated, the questions were plainly for the jury to determine. These assignments of errors cannot be sustained. Nor can it be said that the evidence, as a whole so clearly established fraud on the part of the plaintiff that the defendant was entitled to a directed verdict on that ground."

(Opinion of the court in its original decision of May 25, 1935, 77 F. (2d) 891).

An important point is here submitted to the attention of the Court in connection with paragraph (C) of the Questions Presented relating to that part of the decision and judgment sought to be reviewed which found that there

was no evidence in support of petitioner's claim for $2,524.50 for "labor on goods in process," which finding obviously was the controlling factor in inducing the majority of the court to render its decision.

It is respectfully submitted that the majority of the court erred in finding that there was no evidence in support of this claim.

The Record on Appeal contains substantial evidence on this question, and Justice Morton in his dissenting opinion pointed it out, in part.

In support of its claim for $2,524.50 for cost of labor and materials petitioner introduced the testimony of one E. Gorbea (Record on Appeal, page 37), of José Rivera Soler, president of the company (Record on Appeal, page 97), and of the bookkeeper Rafael Wolf (Record on Appeal, page 64) where the witness refers to the item as $2,524.74.

The policy of insurance (Record on Appeal, page 2), in its first item describing merchandise and etc. insured, covers

> "stock of merchandise in the process of being embroidered, of all repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing and repairing the same, etc."

Justice Morton in his dissenting opinion (Additional Record, p. 349—bottom of page) found:

> "As to the second point, viz., the item of $2,524.50 for "goods in process": The evidence on this is before us and my brethern hold that fraud by the plaintiff with respect to it was established as a matter of law, so that the defendant was entitled to a directed verdict. The opinion states, 'The only evidence in the record relating to that subject (the item in question) is that given by Soler himself,' etc. This would seem to be a clear mistake. The plaintiff's expert account-

ant (Gorbea) refers explicitly to this item as being in the plaintiff's books, 'According to what the books show the plaintiff has' • • • (various items) • • • 'goods in process $2,524.' After discussing other matters he continued, 'Now goods in process $2,534. Here is a voucher which is——.' Objection was made by the defendant to the introduction of the vouchers. The witness (Gorbea) continued, 'I did find an entry in the inventory book corresponding to that voucher,' etc., etc. During a rather lengthy discussion, plaintiff's counsel said there were 'hundreds, perhaps thousands, (of vouchers) which would encumber the record unnecessarily.' Eventually the vouchers were not admitted. The same witness testified that the plaintiff's books and vouchers to which he had referred 'are a complete record of the business transacted by that company (the plaintiff).' The $2,524.50 item was repeatedly referred to and discussed. Soler's testimony about this item was in part as follows:

'As to the item of $2,524.50 for labor and goods in process I would have to get the assistance of my bookkeeper; I really never participated in the work of the accounting department; if he explains to me, • • •; labor and goods in process means work that is not finished; unfinished work; sometimes one goes to the machine department and finds a piece that is finished, but still has to be embroidered, but others that are embroidered but not sewn together yet. We did work for firms outside of Puerto Rico; the American houses supplied us with the material and we supplied the labor and thread for sewing and embroidering; we got the material from the United States and the company supplied the labor and thread and other necessaries to complete the work; then I made out my invoice and took it to the bank, and they gave me credit for it and discounted it.'

• • • • • • •

(Page 350:)

'the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; no, in that item there is included only the price that we collected from the people in New York; that is to say, if my contract price was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozen of those on hand, that $7.50 was insured.'

(Page 350:)

This shows the charges which went into the item. They are of a kind as to which honest mistake is easily conceivable. I suppose that the last statement above quoted is the one on which my brethern rely as conclusively establishing fraud on Soler's part, in the face of the jury's finding to the contrary. There is no evidence that Soler was making any profit on this work, or did not take it at cost. That possibility ought to be eliminated before it is held that his statement above quoted affords conclusive evidence of fraud by him. His testimony by no means shows, as it appears to me, that he may not have acted under honest mistake as to his rights. Apparently, this item was fully supported by the vouchers which were not put in. Conclusive fraud with respect to it does not seem to me to have been shown."

In its request for instructions to the jury respondent did not present the question of fraud with respect to this particular item. It merely questioned the sufficiency of the evidence introduced by petitioner to substantiate it.

Respondent's requested instruction number 4 (Record on Appeal, page 22) was as follows:

"4. You are instructed that there is no evidence from which the cost of labor claimed in the complaint

and in the proof of claim, in the amount of $2,524.50, can be determined and that as to so much of the said claim you should find for the defendant."

The court gave this instruction with the following modification (Record on Appeal, pages 314-315):

> "Now I charge you that, with this modification: unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence—I do not recall it, but if you find it from the record you can find only for such amount as the plaintiff actually paid for labor."

The verdict rendered gives no implication as to whether or not this item was allowed.

The motion for a directed verdict.

At the close of the case respondent presented a motion for a directed verdict (page 15, Record on Appeal). It was overruled, with exception taken by respondent (Record on Appeal, page 13).

The only part of this motion which is material to be referred to in this petition, in view of the decision and judgment complained of, is that contained in its paragraph III, referring to alleged "fraudulent claim and false declarations" (page 15, Record on Appeal) in connection with the proofs of loss, books and claim of petitioner.

After the court overruled this motion respondent presented requests for instructions which left to the jury to find as a matter of fact if the proofs of loss or claim of petitioner had been wilfully and intentionally made. These instructions were given.

See Defendant's Requests for Instructions 1, 2 and 3 (pages 20 to 22, Record on Appeal).

> "The defendant insurance company requests that the court give the following instructions to the jury:

1. You are instructed that the policy of insurance, the subject of this litigation, contains a condition which reads in part as follows:

'If the claim made by the insured (in this case by J. Rivera Soler as president of J. Rivera Soler & Co., Inc.) be in any respect fraudulent, or if any false declaration be made or used in support thereof, or any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy—all benefit under this policy shall be forfeited.'

Such a condition is fair, valid and enforceable and you should keep the words thereof clearly in mind.

This condition required the insured to make honest and truthful representations and statements as to the property affected by the fire and as to the value of the said property at the time of the fire. By the terms of the policy any false and fraudulent statements or representations regarding the value of said property render the policy void.

(In margin:) Good faith in making statements will allow latitude in estimating value.

I charge that if you find that any of the values specified in the proof of loss furnished by the plaintiff to the defendant company were too high or exaggerated, and that the plaintiff caused or permitted the furnishing of such a claim for amounts greatly in excess of the amounts that the officers of the plaintiff corporation knew that such articles were worth with the intention and expectation of getting a greater amount of money for said articles than they were in fairness worth, then the plaintiff corporation was guilty of such fraudulent conduct as would make the policy void, and if you so find your verdict should be for defendant.

I further charge you that any statements made by the officers and agents of the plaintiff corporation concerning the amount or value of the property alleged to have been destroyed, or any statements as to the condition and value of said property written in the

proof of claim, or made here on the witness stand, and that were made fraudulently and with the intention of fraud, would render the policy void.

The court further instructs you that if you believe by a preponderance of the evidence that any officer or agent of the plaintiff corporation submitted to the defendant in support of its claim any books containing any false entries or any fraudulent or false invoices for merchandise or machinery never received or for work never done, or increasing and exaggerating the value of any property alleged to have been destroyed by the fire, the verdict should be for the defendant.

2. I charge you that the burden of establishing fraud rests upon the defendant company. Such fraud on the part of the plaintiff must be established by a preponderance of the evidence. You are to consider the proof of loss submitted by the plaintiff to the defendant, which is in evidence, and all the circumstances and facts to which the testimony of the witnesses has referred regarding the filing of said proof of claim and the facts and book entries submitted to substantiate the same and all other circumstances regarding the condition of the property and the nature and origin thereof.

I further charge you that fraud need not be established by direct proof. In a great majority of cases where fraud exists, it becomes impossible to bring witnesses who can give direct proof that fraud exists. For this reason it may be established by circumstances that convince you that fraud was actually intended and committed by the plaintiff. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires.

(In margin:) These circumstances must preponderate over other testimony to the contrary.

3. I further charge you that if from the evidence produced at this trial you believe that the officers of the plaintiff corporation knowingly and wilfully made

false statements regarding material facts set out in the proof of loss submitted to the court regarding the value and amount of property destroyed, the intention to deceive the defendant company must be necessarily implied as a natural consequence of said acts and you must then find for the defendant.

In cases of this kind the plaintiff must come into court with clean hands, the Insured is presumed to know better than anyone else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims unless honestly made. It is intended to protect insurance companies from frauds which might otherwise be perpetrated on them and is a rule which can do an honest man no harm.

(In margin:) It is also a matter of public policy.

These were given with some slight modifications (Record on Appeal, pp. 310-313).

No Exceptions were Taken to the Giving of Petitioner's Requested Instructions, or to the Modification of Respondent's Instructions on the Question of Fraud."

No exception was taken by respondent to the charge of the court, to the modification of respondent's instructions, or to instructions given for Plaintiff submitting to the jury the question of the willful and intentional character of the alleged false and fraudulent proofs of loss and declarations.

See pages 315, 316 and 317 (Record on Appeal) where appear the exceptions taken by the parties at the conclusion of the charge.

Respondent apparently changed its theory and accepted, and presented to the jury one to the effect that the alleged fraud was a matter for the jury to determine.

Verdict.

The jury, in view of the instructions given for petitioner and respondent and of the charge given by the Court, found a verdict for petitioner in the sum of $17,000 plus interest at 6% (page 24, Record on Appeal).

No motion for a new trial or in arrest of judgment was presented by respondent.

The judgment of the District Court was entered upon the verdict in favor of petitioner and against respondent for the sum of $17,000 with interest at 6% (page 24, Record on Appeal).

Assignment of Errors, of Appellant.

The only assignment of errors of Appellant material to be considered in connection with the decision of the Circuit Court of Appeals complained of, is assignment number 10 (page 28, Record on Appeal).

> "10. That the verdict and judgment are contrary to law in that the amount of loss found by the jury in the said verdict considered in connection with the admission of plaintiff and the evidence of plaintiff is inconsistent with any theory other than that of fraudulent over valuation in plaintiff's sworn proof of loss."

Decisions and Judgments of the Circuit Court of Appeals.

A. The decision and judgment of May 25, 1935 unanimously affirmed the judgment of the District Court, opinion by Justice Morton. (77 F. (2d) 891.)

Pertinent portions of this opinion which are material to be considered for an understanding of the later decision sought to be reviewed by this petition for review are the following:

> "There are ten assignments of error, the first seven of which relate to the refusal of the District Judge to direct a verdict for the defendant, and the next two to

rulings or refusals to rule with respect to damages. The last assignment appears not to be based on any ruling by the trial judge and attempts to bring directly to this court the question whether the verdict and judgment are contrary to law because the amount of damages found by the jury is so much less than the amount of the plaintiff's claim as to prove conclusively that the claim involved fraud. There is no assignment of error with respect to any rulings of law on the portions of the policy relied on in defense. The law of the case was clearly and accurately explained to the jury in a manner which it would not be easy to improve upon (page 325, Additional Record).

* * * * * * *

"As to the tenth assignment of error the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent over-valuation by the plaintiff in the proof of loss. Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it (page 326, Additional Record).

"The remaining assignments of error, the eighth and ninth, relate to the refusal of the trial judge to instruct the jury as to certain items in the plaintiff's claim, that there was no evidence of the value of them. The first of these items is 'the cost of labor claimed in the complaint and in the proof of claim in the amount of $2524.56.' The policy covered by its terms, the expense to the plaintiff of labor which it

had put upon goods of other parties which were sent to it to be manufactured and were destroyed in the fire. The defendant's contention is that there was no evidence as to the value of such labor. The expert accountant called by the plaintiff testified that this item appeared on its books, and he referred the item to certain vouchers which constituted part of the plaintiff's records. The proof of loss, which was sworn to, was put in evidence; it contained the item in question. The plaintiff's president, Mr. Soler, was examined and cross-examined with reference to this proof of claim and to various items in it including this one about which he testified at some length. The details which made up this amount were not presented, nor do they appear to have been specifically called for by the defendant during the trial. From the testimony of the accountant they may have appeared on slips and other informal records which were put in evidence. The District Judge left the matter to the jury saying that this amount was not recoverable 'unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence, —I do not recall it,—but if you find it from the record then you can find only for such amount as the plaintiff actually paid for labor.' We think this ruling was correct" (page 326, Additional Record).

The judgment of the District Court is affirmed with costs." (page 327, Additional Record.)

B. Decision and judgment sought to be reviewed, of January 7, 1936.

Notwithstanding the unanimous decision and judgment first rendered, the court, by Justice Bingham—Justice Morton dissenting—sustained the petition of Respondent for rehearing and rendered judgment vacating its previous judgment, vacating the judgment of the District Court, and remanding the case to the latter court with directions to enter an order for arrest of the judgment with costs to

the appellant in both courts (page 343, Additional Record —case not yet reported).

After considering and resolving in the affirmative the power of the Circuit Court of Appeals to arrest the judgment of the District Court, notwithstanding the peculiar circumstances in this case which distinguishes it from the case of *Slacum* v. *Pomery*, 6 Cranch 221, upon which the Circuit Court of Appeals relied, the court disposed of the case upon the question raised by the tenth assignment of error (page 28, Record on Appeal).

> "10. That the verdict and judgment are contrary to law in that the amount of loss found by the jury in the said verdict considered in connection with the admissions of plaintiff and the evidence of plaintiff is inconsistent with any theory other than that of fraudulent over valuation in plaintiff's sworn proof of loss."

The reasoning of the court in its reconsideration of this assignment of error is set forth in the following applicable portion of the decision:

> "In considering the question raised by the 10th assignment the evidence introduced at the trial and brought here by bill of exceptions is not to be considered, for that is no part of the record proper. The inquiry is confined to such matters as appear in the record proper. That record in this case includes the complaint, proof of loss and the policy (which are included in the complaint), the verdict and judgment" (page 344, Additional Record).
>
> "In the complaint it is alleged that, on the 9th day of February, 1932, the defendant issued to the plaintiff a policy of fire insurance, insuring its goods and property, for one year from the date of the policy, against loss or damage caused by fire in the sum of $30,000; that 'the description of the property insured, the location thereof and the amounts covered by the said policy of insurance' were as follows" (page 345, Additional Record):"

Here follows the description and location of the property insured together with the distribution thereon of the amounts covered by the policy (page 345, Additional Record).

"The 10th condition of the policy provided that 'on the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company a claim in writing for the loss and damage, etc.' And in condition 12 it is provided:

'If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.' (Page 346, Additional Record.)

"Under the first item of the policy covering the property there specified in the sum of $15,000.00 the plaintiff claimed in its proof of loss the destruction of property valued at $17,345.21. Under the second item of the policy covering the property there specified in the sum of $12,000.00, it claimed in its proof of loss the destruction of property valued at $14,835.10. And under the third item insuring property for $3,000, it claimed in its proof of loss $3,745.75—making a total valuation of property claimed to have been destroyed of $35,926.06, the total insurance being $30,000" (page 346, Additional Record).

"The verdict of the jury was for $17,000, and the judgment entered was for that amount. It thus appears in the record proper that the total amount of insurance on the property was $30,000; that the total value of the property insured, as claimed and sworn to in the proof of loss, was $35,926.06, and that the verdict and judgment were for $17,000, or something less than half the total value of the property sworn to in the proof of loss upon which the plaintiff sought to have the company pay it $30,000" (page 346, Additional Record).

"The defendant contends that the great disparity between what the jury awarded ($17,000) and what the plaintiff would have been entitled to ($30,000) had it had property on hand at the time of the fire of the value of $35,926.06, as claimed and sworn to in the proof of loss, necessarily shows that the proof of loss contained fraudulent statements as to the value and character of the property on hand and insured" (page 346, Additional Record).

"It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000 shows on its face and as a matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000" (page 347, Additional Record).

"A similar question arises under the motion for a directed verdict based upon the evidence as to the cost of labor. The cost of labor was one of the elements insured under the policy. It was set down in the proof of loss at $2,524.50" (Additional Record, p. 347).

"Under the motion for a directed verdict the evidence introduced at the trial and included in the bill of exceptions is open for consideration. There is no evidence in the case and counsel for the plaintiff has pointed out none, though requested to do so, showing that the cost of labor 'on goods in process' was

$2,524.50, as stated in the sworn proof of loss. The only evidence in the record relating to that subject is that given by Soler himself (president of the plaintiff company) where he states that the sum of $2,524.50 was the contract price which the company was to receive for manufacturing the goods of others. If the statement in the proof of loss, to which Soler made oath, did not represent the cost of labor, but was the contract price which the plaintiff was to receive from others for whom goods were being manufactured, no other conclusion can reasonably be drawn than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that the plaintiff was not entitled to and was fraudulent. And, under Condition 12 of the policy, deprived the plaintiff of its benefits. Soler was the president of the plaintiff company and made oath to the proof of loss'' (p. 347).

''We had a similar question before us in *Cuetara Hermanos* v. *Royal Exchange Assurance Co.*, 23 F. (2d) 270; certiorari denied, 277 U. S. 590. Article 13 of the policy in that case read the same as Condition 12 of this one. There the value of the property destroyed was largely overstated in the proof of loss and we sustained a directed verdict for the defendant on the ground that the claim made either in the proof of loss or in evidence at the trial was false and so excessive from the standpoint of the value and amount of property actually destroyed that the District Court did not err in directing a verdict for the defendant'' (p. 347-348).

''Our order of May 23, 1935, affirming the judgment of the District Court of Puerto Rico is vacated; the judgment of the District Court of Puerto Rico of May 31, 1934, is vacated, and the case is remanded to that court with directions to enter an order in arrest of judgment, with costs to the appellant in both courts'' (page 348, Additional Record).

The portion of the dissenting opinion of Justice Morton not previously set forth herein is as follows (p. 348, Additional Record):

"Morton, J. (dissenting): My brethren hold first that fraud on the part of the plaintiff conclusively appears on the face of the record without considering any evidence, and second that fraud on the part of the plaintiff with respect to a certain item in the proof of loss was so conclusively established by the evidence that the defendant was entitled to a directed verdict. On neither point am I able to agree.

"As to the first point, passing by immaterial matters, the record before us consists of the complaint with the papers annexed to it, *i. e.*, the policy and the proofs of loss, the answer which sets up many defenses including fraud, and the verdict which was for just about one-half the amount claimed in the proofs of loss. Looking at these papers and nothing else, my brethren hold that fraud on the part of the plaintiff is conclusively established by the discrepancy between the amount of the claim and the amount of the verdict. In the opinion they say, 'the evidence introduced at the trial and brought here by bill of exception is not to be considered, for that is no part of the record proper.' No precedent for the decision is referred to and none has come to my attention (p. 348).

"Fraud as used in this policy means conscious dishonesty. It is a matter of fact. The majority opinion holds, in effect, that, when the amount claimed in a proof of loss under a fire insurance policy is cut down one-half by the jury on the trial of the case, fraud is thereby conclusively established and the proofs cannot under any circumstances have been honestly made. It seems to me, on the contrary, very easy to conceive circumstances under which the amount honestly claimed in a proof of loss might be cut down one-half by a jury. On questions of valuation, and sometimes also on questions of ownership for insurance purposes, there is wide room for honest mistakes and honest

difference of opinion. If we assume, as I think we must, that the jury were properly instructed that fraudulent statements by the plaintiff in the proof of loss would entitle the defendant to a verdict, then the verdict for the plaintiff necessarily involved a finding on the evidence presented that the proofs of loss were not fraudulent. This finding is set aside without considering the evidence (p. 348-349).

"If the verdict for the plaintiff be regarded as inconsistent with the finding on damages, that point should, I think, have been brought to the attention of the trial judge on a motion to set the verdict aside, which was not done. It cannot be presented indirectly in this way. How can we say that the error in the verdict—if there was one—did not consist in awarding inadequate damages on an honest claim, rather than awarding any damages on a dishonest one? Such questions necessarily involve an examination of the evidence. Again the instructions to the jury as to the law under which damages should be assessed—which are not before us—may have been very different from what the plaintiff had in good faith supposed the law to be. Such a mistake is not fraud. For these reasons and others which might be mentioned I do not think that the discrepancy between the claim and the verdict conclusively proved that the claim was fraudulent" (page 349, Additional Record).

Petitioner's Contentions.

The petitioner contends that the later decision of the majority members of the Circuit Court of Appeals sought to be reviewed, which erroneously held that the discrepancy caused by the verdict of the jury from the claim of petitioner established the basis and the right of the court to declare that as a matter of law the claim or proof of loss was fraudulent, and thereby voided the policy; is in irreconcilable conflict with decisions of this Court and of

other circuit courts of appeals and is untenable with the weight of authority.

Under the uniform decisions of this Court and of the circuit courts of appeals the existence of fraud in connection with claims and proofs of loss is a question to be determined by the jury upon satisfactory evidence of wilfulness and intent, not reconcilable with good faith or innocent mistake.

Reasons for Granting the Writ.

Under the decision complained of any discrepancy whatsoever, regardless of amount and of fraud, would justify the trial court to set aside the verdict and arrest the judgment or, if it did not do so, the Circuit Court of Appeals would be justified in vacating and arresting the judgment as a matter of law, without regard to any evidence submitted to the jury of good faith or innocent mistake.

As in the present case with reference to the claim or proof of loss concerning the value of machinery there could be in other cases an honest difference of opinion between the insurer and the insured as to whether the latter should claim and recover the cost or replacement value, or the present market value, which difference might represent an important sum.

The law declared by the majority members of the Circuit Court of Appeals is too broad and drastic.

Whilst it is the purpose of the courts to discourage fraud in connection with insurance claims and proofs of loss they cannot, with due regard to justice and judicial authority, ignore the elements of good faith and human liability to innocently err in estimates of value.

The decision sought to be reviewed presents a serious conflict in an important field of litigation with the decisions of this Court, of the circuit courts of appeals in general,

and with the weight of authority which should be removed in the interest of harmony and order in the administration of justice.

WHEREFORE, it is respectfully requested that this petition for a Writ of Certiorari be granted.

San Juan, Puerto Rico, March, 1936.

FRANCIS H. DEXTER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The original decision and the later one upon rehearing which is complained of are hereto attached in the Additional Record (Original Decision, p. 323; decision upon rehearing, page 343) and pertinent extracts therefrom involved in the questions presented appear in the petition preceding (pages 16 to 24).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (Section 347 (a), Title 28, U. S. C. A.). The time to apply for a writ of certiorari was extended thirty days, or until May 6, 1936 by order of Mr. Justice Brandeis made March 12, 1936.

The Facts.

The facts pertinent to be considered are fully set forth in the statement in the preceding petition (pages 4 to 16).

Specification of Errors.

The errors which we believe were committed by the Circuit Court of Appeals in its later decision are contained in the Questions Presented and Petitioner's Contentions set forth in the preceding Petition.

ARGUMENT.

Conflict of the Decision Complained of With the Leading Case of This Court Upon the Same Matter.

In the case of *Republic Fire Insurance Co.* v. *Weide*, 14 Wallace 375, this Court held:

> "Under a policy, one of whose conditions is that fraud or false swearing on the part of the assured in an examination which, by the terms of the policy, he was bound to submit to on a claim by him for loss, it is only fraudulent false swearing in furnishing the preliminary proofs or in the examination which avoids the policy; *and whether there has been such false swearing is a matter for the jury to determine.*" (Italics ours.)

In its opinion (page 382) the Court declared:

> "* * * It is true the policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. *But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath in their proofs of loss, and their statements when testifying at the trial that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants.* It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that voids the policies, and it was for the jury to determine whether that swearing was false and fraudulent." (Italics ours.)

It does not appear in the report of this case what was the amount of the claim or the verdict of the jury. There was apparently a discrepancy. It appears that the Court affirmed the judgment of the court below and sustained the action of that court in refusing instructions presented by the insurance company which, in effect, declared that as a matter of law a discrepancy between proofs of loss and statements made by the assured on the trial justified the court in assuming fraud and directing a verdict for the company. The court below properly refused to direct a verdict for the company upon the presumption that the discrepancy established fraud on the part of the assured.

The case of *Claflin* v. *Insurance Company,* 110 U. S. 81, will probably be relied upon by respondent, as it has been in other cases, to establish a ruling of this Court contrary to that in the former case. The *Claflin* case is distinguished from the former case in several important respects.

Great American Insurance Company of New York v. *Roney & Berger Co.,* 42 F. (2d) 816 (Circuit Court of Appeals, 3rd Circuit), distinguishes the two cases as follows (page 818):

> "The only case on which defendants rely is *Claflin* v. *Insurance Company,* 110 U. S. 81.
>
> "That decision does not rule this case because it is distinguishable on the issue, which was not whether the insured had made a false claim, but whether the matter with respect to which he made an alleged false statement was material under the forfeiture clause of the policy, and distinguishable on the fact, proven or admitted, that the insured did make a statement with respect to a material matter, which was false."

The *Claflin* case may be further distinguished: (a) it held that the jury could find great discrepancy as evidence of fraud which would forfeit the policy, but it did not declare that the court upon such evidence should declare it a fraud

which, as a matter of law, would forfeit the policy; (b) the *Claflin* case did not refer to the *Republic Insurance Company* case, much less overrule it.

If the *Claflin* case was intended by the Court to establish a contrary doctrine to that established in the former case the Court would have expressed such intention, or purpose.

Conflict Between the Decision Complained Of and the Decisions of Other Circuit Courts of Appeals.

The first decision precisely in point reported in the Federal Reporter System is that of

Mack v. *Lancashire Insurance Company,* 4 Fed. Rep. 59.

This was a decision of the United States Circuit Court for Missouri. We believe that as the United States Circuit Courts were the predecessors of the present United States Circuit Courts of Appeals the decisions of the former will be considered upon the question of conflict.

That case held:

> "The mere fact that the loss is less than that stated in the preliminary proof, would not be sufficient to establish fraud, though if the discrepancy between the true value and that stated by the insured is large, it would be some evidence bearing upon the issue of fraud."

The discrepancy was only evidence to be considered by the jury in the determination of the alleged fraud and was not considered as a matter of law to establish the alleged fraud so as to justify a directed verdict for the insurance company.

> "A sworn statement of the insured as to the amount of the loss, although found to be exeessive, does not constitute false swearing or misrepresentation which

will avoid the policy, where it was made in good faith and there was room for an honest difference of opinion as to whether the loss was total or partial."

Spring Garden Insurance Co. v. *Amusement Syndicate Co.*, 178 Fed. 519 (Circuit Court of Appeals, 8th Circuit).

In that case the proof of loss amounted to $57,373.73. The finding of the Master and the decree of the court thereon was $21,991.08.

The Circuit Court of Appeals affirmed the decree notwithstanding the defense of fraud and some evidence in support thereof. In its opinion (page 531) the court said:

"There was a conflict of evidence in this regard, and an honest difference of opinion is not false swearing within the meaning of the policy so as to avoid these provisions." Citing, *Insurance Company* v. *Weide*, 14 Wallace 382.

"Refusal of points in action on fire policy, as to concealment, or attempt to conceal, material information, held not error when court charged in substance;

" 'Defendant presented points for charge that, if plaintiff concealed or attempted to conceal from defendant material information as to cause of fire, or value of insured property, the verdict must be for defendant.'

"The trial judge charged the substance of the points and also charged on fraud and misrepresentation, and submitted the real question as to whether plaintiff's claim was honestly made or fraudulent because of false statement wilfully made, supported by false swearing."

Great American Insurance Co. v. *Roney & Berger Co.*, 42 F. (2d) 816 (C. C. A., Third Circuit).

The court of appeals affirmed the judgment of the District Court. In this case the insurance was $205,000, the claim of loss $239,585.04, and the verdict was for $204,416.

The court cited *Insurance Company* v. *Weide*, 14 Wallace 375.

In its opinion (page 818) the court declared:

> "The judge charged all that was required, and could have done nothing more unless, as we understand defendant's present position, he should have instructed the jury that, in view of the testimony of the officers of plaintiff company and of the testimony contradicting them, it was their duty to find that there had been fraud and false swearing as to the value of the property destroyed and that therefore, the policies were void.
>
> "*Holding that the issue was not determinable as a matter of law, and hence not subject to a directed verdict,* there was no error in submitting it to the jury." (Italics ours.)

Bearing upon Question D we submit the following extract from this opinion (page 820):

> "We realize that we are not in so favorable a position to pass upon the question as was the trial judge, who having heard the case, could sense its effect upon the jury. We are also aware that it is because of that very advantage that the law submits matters such as this to the trial judge to be disposed of entirely within his discretion, and provides that *his action shall not be disturbed by an appellate court except when he has abused his discretion.*" (Italics ours.)
>
> "Incorrect statements in proof of loss as to quantity of cotton destroyed by fire, if honestly made, did not render the policy void.
>
> "Whether incorrect statements in proof of loss as to quantity of cotton destroyed by fire were fraudulently or innocently made, under evidence held a jury question."
>
> *Camden Fire Insurance Co.* v. *Penick*, 2 F. (2d) 964 (C. C. A. 5th Circuit).

In this case a verdict and judgment of the District Court finding for the insured notwithstanding a discrepancy of eighty-eight (88) bales of cotton in its proof of loss was affirmed. The District Court refused a motion for a directed verdict.

The Court of Appeals in its opinion (page 965) referring to this action of the District Court, which was assigned as error, declared:

> "and instead instructed the jury that false swearing which would deprive plaintiff of the right to recover must be a wilful, intentional act and that if the jury found it was so made plaintiff could not recover. • • • There was no error in denying defendant's motion for a directed verdict; if statements made by plaintiff in his proof of loss were honestly made, although they were admittedly incorrect, they did not render the policy void."
>
> (Citing, *Republic Insurance Co.* v. *Weide,* 14 Wallace 375).

> "We are of the opinion that whether the claim was fraudulently or innocently made was a question peculiarly within the province of the jury."
>
> "Fraud and false swearing in stating in proof of loss that the cause of fire was unknown and that entire loss was due to fire, fixing value of property in inventory furnished to insurers, and claiming total loss from both fire and explosion in proofs of loss under fire and explosion policies respectively, held for the jury."
>
> "An action on fire insurance policy and instruction that if evidence showed that any of the insured property damaged or destroyed by explosion preceding fire plaintiff swore falsely in proofs of loss, and verdict must be for defendant, held properly refused as fairly covered in the general charge, and not stating that untrue statement must have been knowingly and wilfully made to constitute false swearing in the policy."
>
> *Atlas Insurance Co.* v. *Hurst,* 11 F. (2d) 250 (C. C. A., 8th Circuit).

In this case the judgment of the District Court was affirmed although it appeared that the insurance was for $27,000, the proof of loss, $39,000, and the verdict $5,329.16. In its opinion (page 253) the court declared:

> "*We conclude that the defense of fraud and false swearing was not conclusively established by the evidence but that it depended upon the determination of the controverted issues of fact*, and that it was proper to submit those issues to the jury for decision." (Italics ours.)
>
> "In order that false swearing as to value shall constitute a defense to an action on fire policy it must be made to appear that the over valuation was intentional and fraudulent."
>
> "Where the question as to false swearing as to value in an action on a fire policy was properly submitted to the jury, the *appellate court cannot disturb the jury's finding against insurer.*" (Italics ours.)
>
> *National Fire Insurance Co.* v. *Renier*, 22 F. (2d) 671 (C. C. A., 7th Circuit).

In this case the Court of Appeals affirmed the judgment of the District Court which had overruled a motion to direct a verdict based upon the alleged discrepancy between the proofs of loss and the evidence upon the trial.

> "The jury's special finding that the insured stock of merchandise destroyed by fire was worth $25,000, held not inconsistent with finding by the general verdict for insured in an action on the policy that the insured and his son honestly believed the property was worth over $39,000, as they testified."
>
> *Connecticut Fire Insurance Co.* v. *Hurst*, 11 F. (2d) 254 (C. C. A., 8th Circuit).

> "To prevent recovery on a fire policy under a clause against false swearing, over valuation must have been knowingly and intentionally made."

> "Ordinarily, where there is evidence from which intentional over valuation may be inferred within false swearing clause of fire policy, the question whether it was intentional and with intent to deceive or defraud is a jury question."
>
> *Globe & Rutgers Fire Insurance Co.* v. *Stallard*, 68 F. (2d) 237 (C. C. A., 4th Circuit).

In the case of the *American Central Insurance Co.* v. *Harmon Knitting Mills*, 39 F. (2d) 21 (C. C. A., 7th Circuit), the court affirmed a judgment where there was a discrepancy between the proofs of loss and the judgment, although reducing the latter in the sum of $33,000.

The majority of the court in the opinion complained of referred to the previous case of *Cuetara Hermanos* v. *Royal Exchange Insurance Co.*, 23 F. (2d) 270, in which the court sustained a directed verdict for the defendant on the ground that the claim made either in proof of loss or in evidence at the trial was false and so excessive from the standpoint of the value and the amount of property actually destroyed that the District Court did not err in directing a verdict for the defendant.

We respectfully submit that the power of the Circuit Court of Appeals was not the same in the two instances. In that case the Circuit Court of Appeals sustained the action of the District Court which granted the motion to direct a verdict because in that case the District judge found that there was not sufficient evidence to submit the case to the jury.

In the present case the District Court found that there was sufficient evidence to submit the case to the jury, and the record herein justifies its action.

Having so acted it was within the province of the jury to determine whether petitioner was guilty of wilful and intentional fraud which forfeited its policy.

In a similar manner may be distinguished the case of *Columbian Insurance Co.* v. *Modern Laundry,* 277 Fed. 355 (C. C. A., 8th Circuit), and other cases where the question of wilful and intentional fraud had been submitted to the jury.

Conclusion.

Finally, in the present case there is no error apparent of record from the entry of judgment upon the verdict of the jury.

The jury had the right to find as they did upon a matter and to an amount which, under the law, it was their province to consider and determine.

The case of *Slacum* v. *Pomeroy,* 6 Cranch 221, relied upon by the Court of Appeals, and the cases which may be relied upon by respondent to support the proposition that no exception was necessary to be taken to the verdict or the judgment do not apply.

Those cases only apply to such verdicts upon which the court cannot legally enter judgment because of the issues involved in the case in question, or to put it in another way, they only apply to judgments upon which the court "has no foundation" to enter.

The verdict in this case was the result of the instructions given at the request of respondent properly stating the law under the evidence in the case, both of which were the legitimate basis for the verdict and the foundation for the judgment.

The judgment of the Circuit Court of Appeals of January 7, 1936, should be reversed.

San Juan, Puerto Rico, March, 1936.

Respectfully submitted,

FRANCIS H. DEXTER,
Atty. for Petitioner.

Copy of the foregoing petition and brief and of the accompanying record received, March 30th, 1936, subject to the receipt of printed copy of petition and brief.

HENRI BROWN,
By G. E. GONZALEZ,
Attorney for United Firemen's Insurance Co. of Philadelphia.

(7647-C)